

SUPREME COURT OF NEW JERSEY
DOCKET NOS. 59,172; 59,900

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
Plaintiff-Petitioner,	:	On Motion For Leave To Appeal
	:	Granted And Direct Certification
v.	:	Granted To The Superior Court Of
	:	New Jersey, Appellate Division
	:	
	:	Sat Below:
JASON MEYER,	:	
	:	Hon. Lorraine C. Parker, J.A.D.
Defendant-Respondent.	:	Hon. Jane Grall, J.A.D.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-RESPONDENT

Yvonne Smith Segars
Public Defender
Office of the Public Defender
Appellate Section
25 Market Street
P.O. Box 850
Trenton, New Jersey 07101

STEPHEN P. HUNTER
Assistant Deputy
Public Defender

e-mail: Steven.Hunter@opd.state.nj.us

Of Counsel and
On the Brief

DEFENDANT IS NOT CONFINED

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INTRODUCTION

For many decades, trial courts in this state have used drug treatment as a critical option when sentencing drug-addicted individuals to probation. When the Legislature began to enact mandatory imprisonment terms for certain drug-related crimes as part of the Comprehensive Drug Reform Act of 1987 ("CDRA"), it recognized that it must allow exceptions when drug treatment would be more effective in deterring future criminal conduct. Thus, the CDRA included 2C:35-14 to provide "special probation" for those individuals who would no longer qualify for ordinary probation sentences, but who, under very restrictive conditions, could be helped by drug treatment.

Independent of the CDRA, over the last decade, specialized drug courts have been established in every county in New Jersey. For years, drug courts were governed by the Administrative Office of the Courts' Drug Court Manual, which provides that there are two ways to enter drug court: (1) through the 2C:45-1 regular probation statute, for individuals not subject to a mandatory minimum parole disqualifier or a presumption of incarceration, and (2) through the more restrictive 2C:35-14 "special probation" statute, for those individuals who are subject to a mandatory minimum parole disqualifier or a presumption of incarceration.

Suddenly and inexplicably, in 2005, a panel of the Appellate Division, in State v Matthews, 378 N.J. Super. 396 (App. Div. 2005), declared that 2C:35-14 was being interpreted incorrectly; that, in fact, the Legislature intended the statute to say that any individual who requests a probationary sentence subject to drug rehabilitative conditions -- in drug court or not -- must follow the rigid restrictions set forth in 2C:35-14, even those individuals who are not subject to a mandatory minimum parole disqualifier, a presumption of incarceration, or even charged with a drug offense. In Mr. Meyer's case, the trial court did not find Matthews to be controlling and admitted him into drug court through the ordinary probation statute. The state has appealed this decision under questionable authority.

This brief sets forth the many historical, legal, and policy reasons that the Matthews opinion was wrongly decided. Most obvious of all the reasons is the following: since drug courts were operating successfully in this state for years under a particular set of rules, and the Legislature did not attempt to change those rules, it is illogical and inappropriate for an appellate court to suddenly declare that the Legislature intended the statute to be interpreted differently.

This new and flawed interpretation of the statute has had a devastating impact on drug courts and sentencing courts seeking to impose treatment-based sentences. Under the new

interpretation, many successful graduates of drug court programs never would have qualified for admission; many current participants in drug court programs could be considered ineligible; and, worst of all, many worthy potential drug court candidates can never apply for admission. An additional bizarre consequence of the opinion is that non-drug court sentencing judges no longer have authority to add drug rehabilitative conditions to ordinary probation sentences, unless the person qualifies under 2C:35-14.

This Court is urged to swiftly correct the Matthews misinterpretation of the statute.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

Warren County Indictment No. 05-02-61, filed in November 2004, charged defendant Jason G. Meyer with third-degree distribution/possession with intent to distribute imitation CDS in violation of N.J.S.A. 2C:35-11a. (Da1)¹ Warren County Indictment No. 05-02-40, also filed in November 2004, charged Meyer with fourth-degree shoplifting in violation of N.J.S.A. 2C:20-11b(1). (Da2)

On August 19, 2005, Meyer filed an "Application To The Drug Court Program" with the Law Division. (Da3) On August 31, 2005, the Warren County Prosecutor's Office filed a "Legal Eligibility Form" with the court. (Da4) According to the form, Meyer "was legally rejected from participation in the Drug Court Program." (Da4) The prosecutor's form had two columns of "Reason[s] for Rejection" for either "N.J.S.A. 2C:35-14 Cases OR Non-35-14 Cases." (emphasis added) (Da4) Under the column for "N.J.S.A. 2C:35-14 Cases," the prosecutor selected as a reason for rejection that Meyer had "2 or more prior convictions of 1st, 2nd or 3rd Deg. w/exception for 'Poss. Of CDS.'" (Da4) At the bottom

¹Da refers to the appendix to defendant's brief.

Pa refers to the appendix to the State's App. Div. brief.

PSR refers to defendant's presentence report.

1T = transcript of November 4, 2005 (drug court hearing).

2T = transcript of February 23, 2006 (plea).

3T = transcript of April 17, 2006 (motion hearing).

4T = transcript of April 26, 2006 (sentence).

of the form, the prosecutor cited State v. Matthews, 378 N.J. Super. 396 (App. Div. 2005). (Da4)

On October 25, 2005, Meyer filed an appeal from the legal rejection with the Law Division. (Da5-Da12) Meyer argued that "this case is not one which falls under 2C:35-14, and is, therefore, not one for which the State can exclude defendant's application by reference to ... [a] prior record of third degree crimes." (Da7) Under the "Reason[s] for Rejection" section of the prosecutor's own "Legal Eligibility Form" form, the prior conviction reason was listed as "Not Applicable" to "Non-35-14 Cases." (Da4)

On November 4, 2005, the Honorable John H. Pursel, J.S.C., conducted a hearing in this matter. Judge Pursel withheld his decision on the legal eligibility issue and ordered a clinical evaluation of the defendant. (1T 10-19 to 20) A substance abuse evaluation was performed by the drug court personnel. (Da13-Da19) The evaluator determined that Meyer was clinically suitable for drug court because he met "the DSM criteria for Polysubstance Dependence" and recommended that Meyer "enter and complete a Long Term Residential treatment program...." (Da18-Da19)

On December 6, 2005, Judge Pursel issued an order declaring that Meyer was legally eligible for drug court. (Da20-Da25) In

his written opinion, the judge, agreeing with the drug court manual, found that defendants "may be eligible for sentencing in drug court because they fall within the eligibility criteria set forth in N.J.S.A. 2C:35-14, or because they may otherwise be eligible under other sections of the Code of Criminal Justice." (Da21)

Judge Pursel determined that N.J.S.A. 2C:35-14 "provides an alternative to imprisonment" for defendants subject to the presumption of incarceration pursuant to N.J.S.A. 2C:44-1(d) or a mandatory term of imprisonment pursuant to N.J.S.A. 2C:35-7 ("school zone" offense). (Da21-Da22) Judge Pursel found that an additional category of persons subject to N.J.S.A. 2C:35-14 was created by State v. Matthews -- "persons who previously have been convicted of an offense under N.J.S.A. 2C:35-5(a) (Manufacturing, Distributing, or Dispensing a Controlled Dangerous Substance) or any similar offense." (Da22) Refusing to apply Matthews beyond its actual holding, the judge found that N.J.S.A. 2C:35-14 did not apply to Meyer because none of these three circumstances (presumption of imprisonment, school zone offense, previous distribution offense) were present. (Da24-Da25) The judge then applied the "non-N.J.S.A. 2C:35-14 criteria" from the drug court manual and held that Meyer "met

all those criteria" and therefore was "eligible for the Drug Court Program." (Da25)

On December 27, 2005, the State filed a motion with the Appellate Division for leave to appeal Judge Pursel's December 6 order. On January 26, 2006, the Appellate Division denied the State leave to appeal, but held that the "State may appeal an allegedly illegal sentence in the ordinary course." (Da26) The State filed a motion for leave to appeal with this Court on March 13, 2006.

On February 23, 2006, defendant Meyer pled guilty in the Law Division to both third and fourth degree indictments and a fourth degree resisting arrest accusation. (2T 7-5 to 10-2; Da27-Da32) The State moved to stay sentencing, but Judge Pursel denied the State's motion on April 17, 2006. (Da33)

The State filed an emergent appeal from the denial of a stay with the Appellate Division. On April 18, 2006, the Appellate Division denied the State's application for emergent relief. (Da34) The State did not file an appeal with this Court from the Appellate Division's denial.

On April 26, 2006, Judge Pursel sentenced Meyer to five years of ordinary probation pursuant to N.J.S.A. 2C:45-1. (4T 7-6 to 9-15; Da35-Da46) As a condition of his probation, Meyer was required to undergo drug treatment under the supervision of

the Warren County drug court team. (4T 7-9 to 22; Da35; Da39; Da43)

On April 28, 2006, two days after sentencing, this Court granted the State leave to appeal from the Appellate Division's January 26 interlocutory order. (Da47) On or about May 4, 2006, the State filed an appeal with the Appellate Division from Meyer's April 26 sentence. (Da48-Da51) On September 27, 2006, this Court granted Meyer's motion to directly certify the sentencing appeal and consolidate it with the interlocutory appeal. (Da97)

COUNTER-STATEMENT OF FACTS

On October 29, 2004, defendant Jason Meyer sold an "empty blunt" to an individual who thought he was purchasing marijuana from Meyer. (2T 7-5 to 8-7) On the same day, Meyer hid children's clothing under his shirt as he left a department store. (2T 8-11 to 9-16) On January 5, 2006, Meyer was stopped by the police, but he ran down an alley. (2T 9-17 to 22)

LEGAL ARGUMENT

POINT I

THE STATE'S INTERLOCUTORY APPEAL IS MOOT AND SHOULD BE DISMISSED.

"Mootness is ordinarily defined as the inability of a court because of attendant circumstances to grant judicial relief." Pressler, Current N.J. Court Rules, comment 1.2.1a on R. 2:8-2 (2006); see also Marjarum v. Township of Hamilton, 336 N.J. Super. 85, 92 (App. Div. 2000) ("[A]s a matter of judicial restraint, 'courts should not decide cases where a judgment cannot grant relief'" (citation omitted)).

Here the State's interlocutory appeal is from a declaratory judgment that defendant Meyer was legally eligible for sentencing into drug court.² The State sought to stay sentencing, but when the stay was denied in the lower courts, the State did not appeal to this Court. The case proceeded in the Law Division to a final judgment of conviction and an actual sentence that included drug court as a condition of probation. As a result, any issues regarding the declaratory judgment are now moot because the declaratory judgment has been superseded by the final judgment of conviction. See, e.g., Benda v. Benda, 236 N.J. Super. 365 (App. Div. 1989) (interlocutory appeal of an

² Judge Pursel's December 6, 2005, order was a declaratory judgment because it "establish[ed] the rights of the parties ... [and] express[ed] the opinion of the court on a question of law without ordering anything to be done." Barron's Law Dictionary 129 (4th ed. 1996).

order awarding temporary custody was rendered moot by final judgment of permanent custody); Board of Education v. Maas, 56 N.J. Super. 245, 258 (App. Div. 1959) ("[T]he matter of the interlocutory injunction is now moot in light of the granting of the final injunction here under appeal.")

Additionally, since Meyer has been serving his sentence since April 26, 2006, his state and federal constitutional protections against double jeopardy have attached. State v. Ryan, 86 N.J. 1, 10 (1981) ("[J]eopardy attaches as soon as execution of the sentence commences.") Therefore, as noted by the Appellate Division, the State's only possible appeal in this case is to argue that Meyer's sentence was illegal. (Da26) The State's argument in the sentencing appeal appears to be that the probationary conditions relating to drug court, as part of defendant's April 26 sentence, were illegal. (Da48-Da51)

POINT II

THE STATE'S SENTENCING APPEAL SHOULD BE DISMISSED BECAUSE THE STATE HAS NO RIGHT TO APPEAL A LAWFUL SENTENCE.

Defendant Jason Meyer pled guilty to third and fourth degree offenses. There was no presumption of incarceration, no mandatory minimum term, no mandatory parole ineligibility term. The judge lawfully sentenced Meyer to ordinary probation. The probation conditions imposed were that he be supervised by the Warren County drug court team and that he follow all the treatment recommendations of the team. The probation conditions were a lawful and appropriate exercise of discretion pursuant to N.J.S.A. 2C:45-1b(3). Since the State has no right to appeal any aspect of Meyer's sentence, this court should dismiss the State's appeal.

The State's argument relies entirely on State v. Matthews, 378 N.J. Super. 396 (App. Div.), certif. denied, 185 N.J. 596 (2005). Essentially, the State is arguing that a drug-addicted defendant, who pleads guilty to third and fourth degree crimes, may be sentenced to ordinary probation, but cannot receive drug treatment as a condition of that probation. This absurd result is one of the many reasons why State v. Matthews was wrongly decided. This Court should reject the reasoning of the Matthews panel and dismiss the State's appeal.

A. The Judge Lawfully Sentenced Defendant, Who Had Pled Guilty To Third And Fourth Degree Offenses, To Ordinary Probation. The Judge Lawfully And Appropriately Imposed As A Condition Of Ordinary Probation That Defendant Obtain Drug Treatment Under The Supervision Of The Warren County Drug Court.

The source of much of the confusion in State v. Matthews and this case appears to be a misunderstanding of the nature of drug court. Drug court is intensively supervised probation. More specifically, it is a program within probation to supervise and monitor drug and alcohol addicted probationers and assist them in obtaining medical treatment for their addiction. See generally Manual For Operation Of Adult Drug Courts In New Jersey (2002). (Da60-Da61) The drug court "team" is the group of individuals who conduct this supervision of the probationer. What makes drug court unique is that the team is not just made up of probation officers, but has a judge, prosecutor, public defender, substance abuse evaluators, and treatment counselors. The drug court judge is ultimately responsible for managing the supervision of the probationer, but drug court uses a "team approach," meaning that the judge regularly meets with his or her team members to discuss the progress or lack thereof of the probationer and what should be done in response. In most counties, the drug court judge, with input from the drug court

team, makes the initial determination as to whether or not a defendant will be admitted to drug court.

The idea for our present day drug courts began in the mid-1990s when two pilot probation programs were started in Camden and Passaic counties. (Da62) No legislation was enacted. Rather, using the existing laws, such as the court's power to order drug treatment as a condition of ordinary probation pursuant to N.J.S.A. 2C:45-1b(3), drug-abusing defendants were given the chance to participate in rehabilitative drug treatment under the supervision of the judge, prosecutor, and public defender. (Da62) The treatment providers were paid from federal grants obtained for that purpose. (Da62) The pilot programs were so successful that the Administrative Office of the Courts (AOC) sought to expand them to all New Jersey counties and obtain regular funding from our State Legislature. (Da62-Da63)

Around the same time the pilot programs were operating, the Governor "call[ed] for new ways to support drug court programs." (Da79) In response, the Attorney General "propose[ed] a series of specific amendments to [N.J.S.A.] 2C:35-14 in order to facilitate the work of new drug courts" (Da80) N.J.S.A. 2C:35-14 was a "rehabilitative sentencing option" that had been in existence since 1987, but in the Attorney General's opinion was "only rarely used, in part because the statute imposed

barriers for courts, prosecutors and addicts." (Da80) (emphasis added) The proposed amendments would allow the judge to sentence a third degree school zone offender with a mandatory minimum sentence or a second degree offender to rehabilitative drug treatment, which could not be done through ordinary probation. Thus, N.J.S.A. 2C:35-14, renamed "special probation," would "provide judges with new legal tools . . . [to get] addicts into treatment." (Da79) (emphasis added) Most importantly, the Attorney General recommended retaining the optional nature of N.J.S.A. 2C:35-14. (Da79-Da80)

While the Legislature was considering the Attorney General's proposed legislation, the AOC moved forward with the expansion of the pilot drug court programs. Expansion began incrementally with Essex, Union, and Mercer Counties. (Da62)

In 1999, the Legislature enacted the changes to N.J.S.A. 2C:35-14 proposed by the Attorney General. In May 2000, the Conference of Criminal Presiding Judges recommended that drug courts be established as a "Best Practice" in the Criminal Division. (Da63) In June 2000, the Judiciary Council adopted drug courts as a "Best Practice" and called for a comprehensive statewide proposal. (Da63) A proposal for statewide implementation was developed in December 2000. (Da63)

In September 2001, legislation was enacted to begin the statewide implementation of drug courts. (Da63) The legislation created a funding source for payment of the treatment providers and established the extra judicial staff necessary to operate each county's drug court. See L. 2001, c. 243 (N.J.S.A. 2B:2-1). Additional changes to the special probation statute, N.J.S.A. 2C:35-14, or the ordinary probation statute, N.J.S.A. 2C:45-1, were not sought.

On July 22, 2002, the AOC issued Directive #2-02, which promulgated a comprehensive "Manual For Operation Of Adult Drug Courts In New Jersey." (Da52; Da97-Da98) According to the directive:

Last September, legislation was enacted to fund the implementation of a Statewide Drug Court Program. The Manual for Operation of Adult Drug Courts in New Jersey, hereinafter Drug Court Manual, has been approved by the Judicial Council for statewide use. It was developed utilizing the collective expertise of the pilot drug court programs and is a joint product of the Criminal Presiding Judges, Criminal Division Managers, Vicinage Chief Probation Officers, Vicinage Drug Court Coordinators and staff from the AOC Criminal Practice and Probation Services Divisions. As part of the pre-approval process the Attorney General's Office, the New Jersey County Prosecutors Association, the Office of the Public Defender and the Department of Health and Senior Services, Division of Addiction Services all reviewed the draft manual.

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The Drug Court Manual sets forth drug court case processing guidelines and details the different phases of the drug court program and the different levels of supervision within each phase. The Drug Court Manual also details program eligibility criteria which the Judicial Council specifically approved at its June 27, 2002 meeting. The application of uniform statewide eligibility criteria is critical to operating the program equitably throughout the State. The two main sources for the eligibility criteria outlined in Section III of the Drug Court Manual were N.J.S.A. 2C:35-14 and the December, 2000 AOC report entitled: Drug Courts: A Plan for Statewide Implementation. The uniform application of these eligibility requirements will ensure that all of our drug court programs comport with the pledges the Judiciary made to the Legislature in seeking funding for a statewide program.

(Da97)

By September 2004, the statewide implementation plan had been completed, and drug courts were operating in all New Jersey counties. (Da99-Da100)

The dispute in this case centers on the section of the manual concerning the eligibility criteria for drug court. The manual clearly states that "[o]ffenders may be eligible for sentencing in drug court either because they fall within the eligibility criteria of N.J.S.A. 2C:35-14, or because they may otherwise be eligible under other sections of the Code of Criminal Justice." (Da67) (emphasis added). Thus, according to the manual, any defendant eligible for either special probation

or ordinary probation could receive a drug court sentence. The special probation statute is only applicable to individuals who would not otherwise qualify for ordinary probation because of the presumption of incarceration or a mandatory period of parole ineligibility.

In this case, Judge Pursel followed the manual's interpretation of the special probation and ordinary probation statutes. Meyer pled guilty to third and fourth degree charges and was sentenced to ordinary probation with drug court as a probationary condition pursuant to N.J.S.A. 2C:45-1b(3). Every aspect of this sentence was legal. Since there is no statutory provision that allows the State to appeal an ordinary probation sentence, the State simply has no right to appeal Meyer's sentence. State v. Veney, 327 N.J. Super. 458, 460 (App. Div. 2000) ("[A]bsent explicit statutory authority, the State has no right to appeal a sentence.")

B. State v. Matthews Was Wrongly Decided.

The primary issue in State v. Matthews, 378 N.J. Super. 396 (App. Div. 2005), was defendant's appeal of the lower court's denial of his application to drug court. The Law Division judge found that because defendant did not meet the requirements of the special probation statute, N.J.S.A. 2C:35-14, he could not

be sentenced to drug court regardless of the fact that he was eligible for ordinary probation, N.J.S.A. 2C:45-1.

The two most important restrictions in the special probation statute are: (1) N.J.S.A. 2C:35-14c - any defendant who has a single prior conviction for a drug distribution offense cannot be sentenced to special probation over the prosecutor's objection, subject only to a patent and gross abuse of discretion standard; and (2) N.J.S.A. 2C:35-14a(6) - any defendant who previously on two or more separate occasions had been convicted of any first, second, or third degree offense, other than third degree drug possession, is not eligible for special probation under any circumstances.

According to the Appellate Division panel in Matthews, since the defendant could be disqualified for special probation pursuant to N.J.S.A. 2C:35-14c, he could not be sentenced to drug court, regardless of whether or not he was eligible for ordinary probation. The State here is arguing that the same principle should be applied when the defendant is ineligible for special probation pursuant to N.J.S.A. 2C:35-14a(6). Judge Pursel refused to extend Matthews to this case.

State v. Matthews was wrongly decided because: (1) the panel misinterpreted the plain language of the special probation and ordinary probation statutes, which clearly indicate that the

special probation statute is an optional sentencing provision meant to complement the ordinary probation statute, not supersede it; (2) the panel's reasoning was flawed because special probation was intended as a separate sentencing option, and the panel's opinion leads to an absurd result; (3) the panel ignored the legislative history of the special probation statute which shows that the Legislature always intended N.J.S.A. 2C:35-14 as an optional sentencing provision, and, in fact, amended special probation in 1999 with the express purpose of providing defendants with additional access to drug treatment, not to limit defendants who could already receive drug treatment through ordinary probation; (4) the panel's opinion ignored the interpretation given to the special and ordinary probation statutes by the drug court manual, which was drafted by the Judicial Council and the Administrative Office of the Courts in conjunction with representatives from the Attorney General, the County Prosecutors, and the Public Defender; (5) the panel ignored the fact that drug courts had been operating for years under the drug court manual's standards, and that many individuals who have successfully completed drug court would never have been given the opportunity under the Matthews rationale; (6) the panel ignored substantial policy arguments that access to drug court should not be restricted because drug

court works, and it is less expensive and more effective to provide drug treatment than incarcerate individuals; and finally, (7) the panel's opinion does not comport with the overall structure of the sentencing provisions of the Code.

The Matthews panel misinterpreted the plain language of the special and ordinary probation statutes when the panel held that "to allow a sentence under N.J.S.A. 2C:45-1b(3) would be contrary to the legislative intent of N.J.S.A. 2C:35-14c" because the plain meaning of those statutes indicates that the Legislature did not intend the requirements of special probation (N.J.S.A. 2C:35-14c being one of them) to apply to ordinary probation (N.J.S.A. 2C:45-1b(3)). (Da92-Da-93) Indeed, drug court operated for many years in exactly the manner the Matthews panel contended was contrary to legislative intent, and yet, the Legislature never sought to change the manner in which drug court operated.

As stated by this Court, the "goal in construing a statute 'is to discern and effectuate the Legislature's intent.' We start by considering the plain language of the statute. If the language is clear, we interpret the statute consistent with its plain meaning." State v. Lewis, 185 N.J. 363, 369 (2005) (emphasis added) (quoting State v. Brannon, 178 N.J. 500, 505 (2004)); see also State v. Ivory, 124 N.J. 582, 585 (1991).

Ordinary probation is one of the standard authorized dispositions under the Code. N.J.S.A. 2C:43-2b(2). Third and fourth degree offenders are generally eligible for ordinary probation in the court's discretion. However, due to the presumption of incarceration, N.J.S.A. 2C:44-1d, first and second degree offenders are usually not eligible for ordinary probation. The period of ordinary probation "shall be fixed by the court at not less than 1 year nor more than 5 years." N.J.S.A. 2C:45-2a. As a specific condition of ordinary probation, the court may require a defendant "to enter and remain in a specified institution" for "medical and psychiatric treatment" of the defendant's drug addiction. N.J.S.A. 2C:45-1b(3).

The special probation statute clearly states:

Notwithstanding the presumption of incarceration pursuant to the provisions of subsection d. of N.J.S. 2C:44-1, . . . whenever a drug or alcohol dependent person is convicted or adjudicated delinquent for an offense, . . . the court, upon notice to the prosecutor, may, on motion of the person, or on the court's own motion, place the person on special probation, which shall be for a term of five years. . . .

N.J.S.A. 2C:35-14a. The statute lists specific requirements for entry into special probation in subsections a., b., and c. In all three of those subsections, the requirements are prefaced with language limiting them to special probation, e.g.: "A

person shall not be eligible for special probation pursuant to this section if" N.J.S.A. 2C:35-14b; "shall not be eligible for sentence in accordance with this section if" N.J.S.A. 2C:35-14c.

The plain language of the special probation statute indicates that special probation was intended as a separate sentencing option. Unlike ordinary probation, a sentence of special probation can be imposed "[n]otwithstanding the presumption of incarceration pursuant to the provisions of subsection d. of N.J.S. 2C:44-1." N.J.S.A. 2C:35-14a. Unlike ordinary probation, the defendant or the court must make a motion, with notice to the prosecutor, requesting a special probation sentence. Ibid. Unlike ordinary probation, special probation must be imposed for a period of five years. Ibid. Clearly, special probation and ordinary probation were intended to be two different and separate types of sentences. Furthermore, by unequivocal language the Legislature limited the requirements in N.J.S.A. 2C:35-14a, b, and c to special probation. There is simply no support in the plain language of the statutes for the Matthews panel's assertion that N.J.S.A. 2C:35-14c was meant to apply to ordinary probation.

The legal reasoning of the Matthews panel is flawed. The panel purports to base its opinion on the doctrine of in pari

materia, that statutory provisions should be harmonized with the Legislature's intent. According to the panel, "N.J.S.A. 2C:45-1 is a general statute; it provides the court with the authority to impose a variety of conditions on probation. On the other hand, N.J.S.A. 2C:35-14 is specific, in that it provides for the imposition of a sentence of special probation only under certain circumstances." (Da91) The panel then cites the statutory rule of construction that when one statute deals with "the same subject" in a more detailed way, it controls over another more general statute. (Da91) (emphasis added) The major flaw with the panel's argument is that the ordinary probation statute and special probation statute do not deal with the same subject. The plain language of both statutes indicates that they are two completely different sentencing options.

Furthermore, it does not follow that by creating a sentencing option for certain drug and alcohol addicted defendants, the Legislature meant N.J.S.A. 2C:35-14 to be a comprehensive overhaul of the sentencing procedure for all drug addicted defendants. If the Legislature had meant the special probation statute to supersede the ordinary probation statute, it would have done so explicitly.³ State v. Alexander, 136 N.J.

³ If the Legislature had created a special sentencing procedure just for drug and alcohol addicted defendants that made it harder for them to be sentenced to probation compared to other defendants, constitutional principles of equal protection and due process would become relevant.

563, 573 (1994) ("[W]hen a criminal statute is somewhat ambiguous regarding the scope of its application, the ambiguity cannot inure to the benefit of the State.") Moreover, the Legislature never sought to amend either statute even though the drug courts were operating for many years under the principle that any defendant eligible for either special probation or ordinary probation could receive a drug court sentence.

Another major flaw with the Matthews panel's reasoning is the panel's reliance on State v. Bausch, 83 N.J. 425, 433 (1980), for the principle that the judiciary cannot "lessen or reduce a sentence where the Legislature has provided a mandatory penalty." (Da93-Da94) However, the special probation statute is clearly an optional sentencing provision: "may, on motion of the person, or on the court's own motion, place the person on special probation." N.J.S.A. 2C:35-14a (emphasis added). The Matthews panel has taken the requirements of a particular optional sentencing provision and held that those requirements must be applied in all cases. The panel has clearly taken the special probation requirements out of context and interpreted them in a manner not intended by the Legislature.

It is axiomatic that "a court should strive to avoid statutory interpretations that 'lead to absurd or unreasonable results.'" Lewis, supra, 185 N.J. at 369 (citation omitted).

The absurd result of the Matthews panel's opinion is that a drug-addicted defendant, who pleads guilty to a third-degree crime, may be sentenced to ordinary probation, but cannot receive drug treatment as a condition of that probation. This is completely contrary to the purpose of the special probation statute, which was to provide additional access to probationary drug treatment for those unable to receive it through ordinary probation.

The Matthews panel's opinion is at odds with the legislative history of the special probation statute. When N.J.S.A. 2C:35-14 was first enacted in 1987, a defendant could only be sentenced under its provisions if the defendant requested a 2C:35-14 sentence. Part of the Attorney General's proposal in the mid-1990s to amend the statute was to allow the judge to move for a special probation sentence. However, the optional nature of 2C:35-14 was retained. In fact, as explained in the Attorney General's report to the Governor, the entire purpose of the changes that were proposed to the Legislature was "to support drug court programs" by providing "judges with new legal tools . . . [to get] addicts into treatment." (Da79) The Attorney General always referred to the special probation statute as a "sentencing option." (Da80) Clearly, the Attorney General's view of special probation was that it was meant to give judges

an additional way to order drug treatment: "The use of court-ordered treatment as a sentencing alternative should be increased and enhanced in appropriate cases." (Da79) The Attorney General never indicated that the special probation statute should be used to restrict access to ordinary probation drug treatment.

The Matthews panel's opinion clearly rejected the AOC manual's statement that "[o]ffenders may be eligible for sentencing in drug court either because they fall within the eligibility criteria of N.J.S.A. 2C:35-14, or because they may otherwise be eligible under other sections of the Code of Criminal Justice, [such as ordinary probation]." (Da67) (emphasis added). According to the Matthews panel, the manual is merely a "procedural tool for operational guidance for New Jersey judiciary staff" and thus is not a binding authority. (Da93)

Nevertheless, the panel ignored the fact that the manual was a "joint product of the Criminal Presiding Judges, Vicinage Drug Court Coordinators and staff from the AOC Criminal Practice and Probation Services Divisions," and was specifically approved by the Judicial Council. (Da97) Additionally, "as part of the preapproval process the Attorney General's Office, the New Jersey County Prosecutors Association, the Office of the Public

Defender and the Department of Health and Senior Services, Division of Addiction Services all reviewed the draft manual.” (Da97) Thus, every possible agency or organization affected by drug court was consulted prior to the manual’s final approval, and the manual itself was approved at the highest levels of judiciary management. The Attorney General’s Office and County Prosecutors Association never raised any objections to the manual’s interpretation of the special and ordinary probation statutes during this process.⁴ Therefore, though perhaps not binding, the considered opinion of so many experts on criminal law, and the drug laws in particular, is persuasive authority, and should not have been rejected by the Matthews panel.

The Matthews panel ignored the fact that drug courts had been operating for many years under the manual’s standards for admission and that many individuals who have successfully completed drug court would never have been given the opportunity under the Matthews rationale. Drug court is considered a great success by the Legislature, the judiciary, the criminal bar, and the public in general. On October 18, 2004, the judiciary’s statewide drug court manager made the following statements before the Assembly Regulatory and Oversight Committee:

⁴ In fact, the Attorney General’s Office never participated in the Matthews appeal and has not yet entered an appearance in this matter.

There is much excitement and enthusiasm about . . . the fact that New Jersey is the first state with a population over one million to establish an adult drug court program in every county. We are national leaders in this area.

This program has achieved much success in the goal of breaking the cycle of addiction through substance abuse treatment, judicial monitoring, intensive probation supervision and rigorous drug testing in support of individuals who were previously thought to be "hopeless." Drug Court has been successful in breaking what has sometimes been a multi-generational problem of drug abuse. Below are some facts and figures about the current status of the program:

- Approximately 1,850 non-violent drug addicted offenders have been sentenced to drug court since the second group of drug courts began on April 1, 2002.
- Before that 2,500 offenders participated in drug court in the original five pilot programs.
- The drug courts attempt to ameliorate the problem of over-representation of minorities in prison, as 68% of program participants are minority citizens.
- Almost three-quarters of the participants who entered the statewide program have either successfully completed the program or are currently active in good standing.
- Approximately 300 participants have graduated from the adult drug court program and over 250 are in the final phase of the program and will be graduating within the next year.

- Of those that graduate, over 94% are full time employed.
- All program graduates are tracked for new arrests, convictions and resulting State Prison sentences.
- The current rate of re-arrest for drug court graduates remains low (at 14%). This rate remains consistently below the re-arrest rate for drug court graduates nationally (at 27%).
- The current rate of conviction for new indictable offenses is 6 percent and only half of those convictions resulted in a State Prison term.
- Forty-nine (49) drug-free babies were born of previously addicted mothers saving the health care and social service system an extensive amount of money. This represents 49 babies born in our State who are NOT addicted to drugs or alcohol at birth.
- At least 52 participants have regained custody of their minor children while participating in the drug court program. Many of those children were in foster care under DYFS supervision.

(Da99-Da100)

The Matthews panel ignored substantial policy arguments that access to drug court should not be restricted because drug court works, and it is less expensive and more effective to provide drug treatment than incarcerate individuals. According to the drug court manual:

A revolution has occurred in the criminal justice system during the past ten years. It began at the grassroots level with a few

people who realized that the old approach to the drug using offender-incarceration and more incarceration wasn't working. As the numbers of accused drug offenders has increased, there simply have not been enough jails and prisons to hold them. Drug abuse is breaking up families, destroying lives and devastating our communities.

It takes a new kind of team, with judges, prosecutors and defense attorneys, supervision and corrections officers, and rehabilitation and treatment providers working together to restore our communities.

B. RUNAWAY COST OF INCARCERATION

Nationally, the problem of drug use and the crime it generates is as great today as it has been in the past. Despite efforts on the scale of waging a war against illegal drug use, the plague is still among us. There is an increasing awareness that simply incarcerating drug offenders has not, and cannot, resolve the underlying problem that caused the criminal activity. The costs of failing to adequately address the problem are staggering. The cost of continuing to build prisons to house offenders has skyrocketed. State budgets are being strained to deal with the cost of corrections. The societal cost of continued drug-driven criminal activity can be measured by looking at drug addicted newborns, children in foster care, violence in neighborhoods, unsafe streets and unpaid child support.

New Jersey has seen major increases in the number of arrests generally, the number of arrests in drug cases, especially with the enactment of the "Comprehensive Drug Reform Act of 1986," and the percentage of offenders being sentenced to serve time in state institutions. Data provided by the New Jersey Department of Corrections show:

- Total inmate population increased by 457 percent from 1977 to 2000.
- The Corrections budget grew from \$92.3 million in 1980 to \$845.7 million in 1999.
- More than 42 percent of New Jersey's inmates report an "extreme" problem with drugs.

C. IMPACT ON MINORITY COMMUNITIES

We are arresting more people, sentencing more people and incarcerating more people, but drug use and the crime it generates is still with us despite substantial efforts to eliminate it. Our minority communities are hit the hardest as a disproportionate percentage of inmates are minorities.

- New Jersey's inmate population is 64% African-American and 18% Hispanic.
- Early data show that New Jersey's five pilot drug courts address minority concerns as approximately 85 percent of offenders diverted from prison into drug courts are minorities.

D. DRUG COURTS-AN ALTERNATIVE APPROACH

Drug courts are a highly specialized team process that function within the existing Superior Court structure to address nonviolent drug-related cases. They are unique in the criminal justice environment because they build a close collaborative relationship between criminal justice and drug treatment professionals. Within a cooperative courtroom atmosphere, the judge heads a team of court staff, attorneys, probation officers, substance abuse evaluators, and treatment counselors all working in concert to support and monitor a participant's recovery. Drug courts

programs are rigorous, requiring intensive supervision based on frequent drug testing and court appearances.

Drug court partnerships develop comprehensive and tightly structured regimens of treatment and recovery services. What is different in drug courts is the continuing oversight and personal involvement of the drug court judge in the treatment process. By closely monitoring participants, the court is able to actively support the recovery process and react swiftly to impose appropriate therapeutic sanctions or to reinstate criminal proceedings when participants cannot comply with the program. Together, the drug court judge, prosecutor, defense attorney and treatment professionals maintain a critical balance of authority, supervision, support and encouragement.

(Da58-Da60)

Finally, the Matthews panel's opinion does not comport with the overall structure of the sentencing provisions of the Code. As explained by this Court in State v. O'Connor, 105 N.J. 399, 406-408 (1987) and State v. Roth, 95 N.J. 334 (1984), uniformity in sentencing is one of the major goals of the Code. The first sentencing decision the judge must make is whether or not to impose imprisonment. The judge must consider the presumption of incarceration in N.J.S.A. 2C:44-1d along with the degree of the defendant's crime. Once the judge makes the "in/out" decision, other provisions of the Code guide, and in some cases mandate, the judge's discretion in setting the conditions of imprisonment

or the non-custodial sentence. Finally, there are various exceptions throughout the Code that allow a judge to impose a legal sentence outside of the normal sentencing scheme. Some of these exceptions are mandatory; others are optional.

The Matthews panel's opinion violates this basic sentencing procedure because it holds that an optional sentencing provision, special probation, must be considered before a judge can impose a sentence pursuant to the normal sentencing scheme. The proper sentencing procedure is that an optional sentencing provision should only be considered after the judge determines what the defendant's sentence would be under the normal sentencing scheme.

The whole purpose of allowing a defendant to move for sentencing pursuant to the special probation statute is to enable the judge to impose a legal sentence outside of the normal sentencing scheme. If the judge decides to sentence defendant to probationary drug treatment under the normal sentencing scheme, there is simply no reason for either the defendant or judge to seek sentencing pursuant to the special probation statute. It is only in cases where the judge in his discretion will not or legally cannot sentence defendant to probationary drug treatment that it becomes necessary for the defendant or the judge to move for special probation sentencing.

It also makes sense when compared to other provisions in the Code, that the Legislature would make the requirements for special probation stricter than ordinary probation and give the prosecutor veto power because special probation is an exception to mandatory imprisonment and/or the presumption of imprisonment. Compare N.J.S.A. 2C:35-12 (allowing prosecutor to waive certain mandatory minimum sentences in his or her discretion, subject only to an arbitrary and capricious standard of review) and N.J.S.A. 2C:44-1d (court may only overcome the presumption of imprisonment if it finds imprisonment would be a serious injustice which overrides the need to deter, State may appeal) and N.J.S.A. 2C:44-1f(2) (allowing the court to sentence a defendant one degree lower if it finds mitigating factors substantially outweigh aggravating factors and interest of justice requires downgrade, State may appeal).

For all these reasons, Meyer asks this Court to reject the State's argument and the reasoning of the Matthews panel, and dismiss the State's appeal.

POINT III

UNDER STATE AND FEDERAL DOUBLE JEOPARDY PRINCIPLES, ONLY THE ILLEGAL ELEMENTS OF A SENTENCE CAN BE CORRECTED. HERE, THE ONLY ELEMENT OF DEFENDANT'S SENTENCE THAT THE STATE CLAIMS IS ILLEGAL IS THE CONDITION OF PROBATION RELATING TO DRUG TREATMENT. THUS, IF THE STATE'S SUBSTANTIVE ARGUMENT IS CORRECT, THE DEFENDANT MUST REMAIN ON PROBATION, BUT THE REQUIRMENT OF DRUG TREATMENT WILL BE REMOVED.

Defendant Meyer's sentence to ordinary probation "was a lawful discretionary call." State v. Eigenmann, 280 N.J. Super. 331, 346 (App. Div. 1995). "Depriving defendant of that sentencing classification after he had begun to serve his sentence [would be] . . . a violation of his double jeopardy rights." Id. at 346-47.

In State v. Eigenmann, the Appellate Division addressed the issue of whether double jeopardy principles imposed any limitation on a court's authority to correct an illegal sentence. The defendant in Eigenmann was found guilty by a jury of first and third degree crimes. Id. at 334. The trial judge decided to sentence defendant as a young adult offender pursuant to N.J.S.A. 2C:43-5. Ibid. However, the judge imposed an illegal 28 month custodial term because the court "could not lawfully impose less than five-year indeterminate terms on the first- and third-degree convictions." Ibid. The State

appealed, and the matter was remanded to correct the illegal sentence. Ibid.

The original trial judge died prior to the resentencing in the Law Division. Ibid. A new judge found defendant had "no vested interest in any illegal sentence." Id. 335. The judge refused to sentence defendant as a youthful offender, and instead imposed an aggregate prison term of fifteen years. Ibid. The defendant appealed, and the Appellate Division held "that defendant's resentencing violated his double jeopardy rights, and that he must now be sentenced as a young adult offender to concurrent five-year indeterminate terms." Id. at 346.

The panel surveyed relevant caselaw from New Jersey and other jurisdictions and concluded "that the court's authority in correcting sentences is limited and must be sparingly exercised." Id. 342-46. In particular, a court may correct an illegal sentence "only to the extent necessary to bring the sentence into compliance with the statute." Id. at 344-45 (quoting United States v. Fogel, 829 F.2d 77, 89-90 (D.C. Cir. 1987)). That is because the defendant has "a legitimate expectation of finality" in the lawful elements of his or her sentence. Ibid. Increasing the lawful elements of a sentence would violate "the double jeopardy clause." Id. at 345.

Thus, the panel concluded:

The simple fact is that the original sentencing judge lawfully sentenced defendant as a young adult offender under circumstances requiring five-year indeterminate sentences. The sole illegality was that the indeterminate terms were fixed below five years. That illegality can be corrected. But, once service of the sentence commenced, the lawful discretionary elements of the sentence--no matter how thoughtlessly or erroneously conceived--could not be made more burdensome.

Here, the "sole illegality" claimed by the State is the condition of defendant Meyer's probation relating to drug treatment and supervision by the drug court team. The State does not claim, nor has any basis to claim, that Meyer's sentence to ordinary probation after pleading guilty to third and fourth degree crimes was illegal. Under the reasoning of Eigenmann, only an illegal element of a sentence may be corrected. In this case then the only remedy available to the State would be to remove the allegedly illegal condition of probation relating to drug treatment and drug court.

Ultimately, the State is arguing in this case that Meyer, a person addicted to drugs who is currently receiving treatment for his addiction, must immediately stop treatment. According to the State, Meyer cannot receive further drug treatment while he is serving his ordinary probation term. This absurd result

underscores the fact that State v. Matthews was wrongly decided, and that the State's substantive argument relying on Matthews should be rejected.

CONCLUSION

For the reasons expressed in Points I, II and III, defendant respectfully urges the Court to dismiss the State's appeal.

Respectfully submitted,

YVONNE SMITH SEGARS

Public Defender

Attorney for Defendant

BY: _____

STEPHEN P. HUNTER

Assistant Deputy Public Defender

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